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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91232427
Party	Defendant Interprofession du Gruyère, and Syndicat Interprofessionnel du Gruyère
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

INTERNATIONAL DAIRY FOODS
ASSOCIATION, U.S. DAIRY EXPORT
COUNCIL, ATALANTA CORPORATION, and
INTERCIBUS INC.,

Opposers,

v.

INTERPROFESSION DU GRUYÈRE,
and SYNDICAT
INTERPROFESSIONEL DU
GRUYÈRE,

Applicants.

Opposition No. 91232427
Consolidated with Opposition Nos.
91232442, 91232446, and 91232448

APPLICANTS' TRIAL BRIEF

(Applicants' Statement of Objections to Evidence is being filed separately)

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DESCRIPTION OF THE RECORD

Opposers' evidence is described in Opposers' trial memorandum. During the trial testimony of Opposers' witnesses, Thomas Gellert and Fermo Jaeckle, Applicants objected to certain testimony. Those objections, along with objections to Opposers' Trial Exhibits and Notices of Reliance, are set forth in detail in a separate Statement of Evidentiary Objections.

Applicants submitted testimonial declarations of (1) Philippe Bardet, the Director of Interprofession du Gruyère ("IDG"), one of the Applicants (TTABVUE #37); (2) Romain Sandoz, President of the Syndicat Interprofessionnel du Gruyère ("SIG"), the other Applicant in this proceeding (included in TTABVUE #36); (3) Bernard Lehmann, Director of the Swiss Federal Office for Agriculture ("FOAG") (included in TTABVUE #36); and (4) Marie Guittard, the Director of the French National Institute of Origin and Quality (included in TTABVUE #36).¹ The Bardet Declaration includes Applicants' Trial Exhibits 1-9, and the Sandoz Declaration includes Applicants' Trial Exhibit 10. Applicants also submitted a Notice of Reliance, which includes Applicants' Trial Exhibits 11-21 (TTABVUE #35). Opposers have not raised any objections to Applicants' Declarations or to Applicants' Trial Exhibits. Therefore, Applicants' Declarations and Trial Exhibits are in evidence.

STATEMENT OF THE ISSUES

The issue in this proceeding is whether GRUYÈRE, a certification mark for the famous cheese made for centuries in the GRUYÈRE region of western Switzerland and east-central

¹ Opposers claim that Applicants "submitted two declaration from affiliated individuals," (Opposers Brief at 4) and that "Applicants have not submitted a declaration or other testimony from a representative of the French Applicant." (Opposers' Brief at 2). Like many of the assertions in Opposers' Brief, these claims are false.

France, and “widely considered among the greatest of all cheeses” (Applicants’ Trial Exhibit 11) is generic. Opposers have the burden of proof and have utterly failed to meet that burden.

FACTS

GRUYÈRE cheese has been made in the mountainous GRUYÈRE region of Switzerland and France since 1115 AD. It is painstakingly made from local, natural ingredients using traditional methods that assure the connection between the geographic region and the quality and characteristics of the final product. The entire cheese-making process is subject to certification by Applicants. Cheese made in Wisconsin cannot duplicate the unique flavor of genuine GRUYÈRE cheese made in Switzerland or France. By urging that they should be permitted to use the name GRUYÈRE on cheese made in Wisconsin, Germany, or someplace else, Opposers are seeking a license to mislead, deceive, and confuse consumers.

Traditional methods of making GRUYÈRE cheese.

The name GRUYÈRE derives from the area of Switzerland where it was first made: the district of La Gruyère in the Canton of Fribourg. The original area of production has since been expanded to include the cantons of Vaud, Neuchâtel, and Jura, as well as a few municipalities of Bern, and some neighboring areas of France. (Bardet Dec.¶ 2).

GRUYÈRE cheese continues to be made by traditional methods, passed down from generation to generation, using only local ingredients. These ingredients and methods, along with expertise of its makers, give GRUYÈRE cheese its unique, inimitable, and sought-after flavor and impeccable quality. The procedure for making GRUYÈRE cheese is precisely specified and strictly controlled. Three groups in the region are involved: dairy farmers (who produce the milk), cheesemakers (who turn the milk into cheese), and “affineurs” (who age or mature the cheese). All three groups follow each prescribed step to the letter. (Bardet Dec.¶ 3). Since 1981,

the Swiss specifications (Applicants' Trial Exhibit 1), have been officially approved by the Swiss Federal Office for Agriculture. The similar French specifications for GRUYÈRE cheese, as well as the precise areas of France where it may be made, are in Applicants' Trial Exhibit 10. These formal specifications merely codify the centuries-old cheese-making practices.

Several factors contribute to the flavor, texture, color, and aroma of GRUYÈRE cheese. The first is the milk from which the cheese is made. The cows are fed solely on natural forage – fresh grass in summer and hay in winter, with no additives or silage. No antibiotics or growth hormones may be used. The milk is never pasteurized. The alpine grasses and the micro-organisms present in raw milk impart flavor to the cheese. Pasteurization, which involves heating the milk to high temperatures, would destroy these flavors. (Bardet Dec.¶ 4).

In France, as in Switzerland, the geographic areas from which the milk is obtained are “upland areas and limestone plateaux that are difficult to cultivate and suited to grassland grazing of dairy herds adapted to harsh conditions of mountain regions, with adjacent valleys where ‘Gruyère’ can be matured and distributed.” (Applicants' Trial Exhibit 10.) The climate in these areas is mountainous or sub-mountainous. To assure a close link between the land and the final product, the cows are fed only grass and hay, and at least 80% of the roughage consumed by the cows originates within the geographic area. These local, varied, and natural plants promote the development of aromatic compounds in the cheese. The cows are never fed with fermented silage, and no additives or transgenic products are permitted. All ingredients that are permitted to be fed to the cows are strictly limited under the specifications. The milk is never pasteurized, so as to preserve its natural flavors. As the specifications state, “The aromatic richness of the natural prairie flora finds its way into the cheeses through the milk's own microflora.” (Applicants' Trial Exhibit 10).

Twice a day, in the morning and in the evening, each milk producer delivers milk to its assigned cheese dairy. The morning milk is merged in a copper vat with the evening milk, which was left to settle all night. The cheesemaker adds starter cultures, made from whey, to mature the milk. Then he or she adds rennet, to curdle the milk. After 35 to 40 minutes, the milk in the copper vat has turned into a dense mass. Because the milk was not heated before the curdling, it maintains all of its flavor and aromas. The copper vats add to the flavor. (Bardet Dec.¶ 5).

This curd mass is then cut into granules using large knives called “cheese harps.” Then the contents of the vats are gradually heated to 57° C (135°F) for 40-45 minutes. (Bardet Dec.¶ 6).

Once the heating temperature is reached and the granules are the size of wheat grains, the cheesemaker takes a handful of grains and carefully kneads them into a mass to check the texture. The contents of the vat (grainy curds and whey) are then pumped out into round molds. Each mold is marked on its outer edge (which is called the “heel”) with the GRUYÈRE name, along with the number of the cheese dairy. The whey drains from the molds and is collected in a large basin underneath. Each wheel is then pressed for about twenty hours, with an applied force of up to 900 Kilograms or 1,980 pounds. (Bardet Dec.¶ 7).

The following day, the cheesemaker removes each wheel from the mold and puts the wheels in a 22% concentrated salt bath or brine, for 24 hours. Then begins the maturation. The wheels are stored for three months in the cheesemaker’s cellar. He or she will give them almost daily care, in order to help the formation of a fine protective rind. During the maturing process, the cheese maturers rub the cheese with a mixture of local, natural microflora, salt, and water, called a “smear” (or “morge” in French). The smear – and the flavors imparted by it – is another link between the natural environment of the Gruyère region and the final cheese product. (Bardet Dec.¶ 8).

After three months, the wheels leave the cheese dairy to be stored in the caves d'affinage (maturing cellars) for a slow maturation process in a 90% humidity environment and a temperature of 15° (59°F). During this time, the wheels are turned over and brushed with salt water. The affinage lasts in total between five and eighteen months. (Bardet Dec.¶ 9).

GRUYÈRE cheese is aged for at least five months before it is offered for sale. This aging process allows the characteristic flavor of GRUYÈRE to emerge. Younger GRUYÈRE cheeses have a softer texture and a milder taste than cheeses that have been aged longer. The flavor of an aged GRUYÈRE can be described as nutty, earthy, and fruity, with a balance of sweetness (like caramel) and saltiness. The texture is firm and dense, with small crystals that form during the aging process. The color is pale cream, and the cheese generally does not have holes. (Bardet Dec.¶ 10).

GRUYÈRE cheese is subject to rigorous inspection as part of the IDG certification process. A first qualitative assessment is carried out at the three-month mark when the cheese leaves the cheesemaker's cellars to be sent to the affineur. The assessment is carried out by a committee composed of an appraisal officer from IDG and an expert currently working as a cheesemaker. Appeals can be made, after which the cheese is newly examined by the Board of Appeal, composed of two representatives of the affineurs and a cheesemaker. The final assessment is made when the cheese leaves the cellars of the affineurs, to be distributed and sold to the public. (Bardet Dec.¶ 11).

GRUYÈRE cheese produced by one of IDG's members won the title "Best Cheese In The World" at the World Cheese Awards four times: in 1992, 2002, 2005 and 2015, the only cheese ever to have done so. (Bardet Dec.¶ 12).

The GRUYÈRE mark in the United States.

IDG exhibits GRUYÈRE cheese at two professional international trade fairs in the United States: the Specialty Food Association's Summer Fancy Food Show, the largest specialty food industry event in North America, held in New York each June; and the Specialty Food Association's Winter Fancy Food Show, held in San Francisco each January. IDG's President regularly attends the New York show, and while there he meet retailers, distributors, and members of the food service industry. Applicants' Trial Exhibit 2 consists of photographs of IDG's booth at the New York show. Except for GRUYÈRE cheese from Switzerland, no exhibitor at either show offers cheese under the Gruyère name. In addition to attending the show, IDG's President regularly visit retail stores that sell GRUYÈRE cheese in the U.S., where he speaks to retailers and consumers. Consumers with whom he speaks know that GRUYÈRE cheese is made in Switzerland and has a unique and distinctive flavor. They do not use the term GRUYÈRE to refer to cheese made in the United States or elsewhere. (Bardet Dec.¶ 13).

In addition to IDG's presence at the Fancy Foods Shows, IDG publishes and distributes in the United States brochures and recipes in the English language to promote the GRUYÈRE mark and cheese sold under the GRUYÈRE mark. (Representative samples are included in Applicants' Trial Exhibit 3). GRUYÈRE cheese is also featured on IDG's international GRUYÈRE website (www.gruyere.com) which is available in a number of languages, including English, and on the "Cheeses from Switzerland" website (www.cheesesfromswitzerland.com). These websites are in turn featured on the brochures and recipes in Trial Exhibit 3.

IDG regularly collaborates in the United States with Swiss Tourism, which promotes tourism in Switzerland to U.S. travelers through the website www.myswitzerland.com. For example, IDG co-sponsored bike tours in New York and San Francisco and in Switzerland by supplying GRUYÈRE cheese to the riders. IDG also collaborates with Swiss International

Airlines, by for example providing samples of GRUYÈRE cheese on flights to and from Switzerland. IDG is also prominently featured on the website www.myswitzerland.com/en-us/home.html, a website that promotes tourism in Switzerland. (Bardet Dec.¶ 15).

IDG works closely with radio stations in such cities as New York, San Francisco, Philadelphia, Boston and Miami, where it has co-sponsored talks about recipes featuring GRUYÈRE cheese. Similarly, IDG has co-sponsored videos on the *Saveur* magazine website, including one in which a well-known chef prepares a dish using GRUYÈRE cheese, and the GRUYÈRE product is prominently seen in the video. <https://www.saveur.com/videos?dom=sav-&loc=mainnav&lnk=videos&video=x6isaqw>. (Bardet Dec.¶ 16).

U.S. cheese producers have virtually stopped using Gruyère as a name for cheese.

A significant number of cheesemakers in the U.S. know and understand that the GRUYÈRE mark should be used only for cheese made in the Gruyère regions of Switzerland and France and that the GRUYÈRE mark should not be used on cheese made in the U.S. IDG has actively tried to educate U.S. cheesemakers, retailers, and consumers that GRUYÈRE is a certification mark that may be used only on cheese produced in the Gruyère regions of Switzerland or France and certified by the Applicants. Roth Cheese, the largest and only significant U.S. producer of what used to be called “domestic Gruyère,” now uses GRAND CRU ORIGINAL, GRAND CRU RESERVE, and GRAND CRU SURCHOIX as the names for the cheeses it formerly called “domestic Gruyère.” <http://www.rothcheese.com/cheese/grand-cru/#grand-cru-original>. (Applicants’ Trial Exhibit 15).

In addition, the Wisconsin Milk Marketing Board has revised its website, which promotes cheese made in Wisconsin. In response to a request from the Applicants, the Wisconsin Milk Marketing Board website no longer uses GRUYÈRE as the name for a cheese made in

Wisconsin. Instead, it uses the term “Alpine Style.” See <https://www.wisconsincheese.com/find-cheese/ch/27/alpine-style>. (Applicants’ Trial Exhibit 16). Significantly, Wisconsin Milk Marketing Board did *not* oppose Applicants’ application to register the certification mark GRUYÈRE.

Similarly, smaller cheese producers use the designations “alpine-style” or “mountain-style” or use fanciful names for their cheese. (Bardet Dec.¶ 19-20). For example, Uplands Cheese Company, located in Wisconsin, uses the name Pleasant Ridge Reserve for its “aged, alpine-style cheese.” This is not an obscure or unknown cheese. According to the Uplands website, “Pleasant Ridge is the most-awarded cheese in American history, having won Best of Show in the American Cheese Society’s annual competition three times (2001, 2005 and 2010), and having also won the US Cheese Championships in 2003. It is the only cheese to have won ACS Best of Show three times, and the only cheese to have ever won both of the major, national cheese competitions.” (Applicants’ Trial Exhibit 14).

Another prize-winning cheese maker, Consider Bardwell Farm, in Vermont, uses the names RUPERT and RUPERT RESERVE for its aged alpine-style cheese. Jasper Hill Farm, in Greensboro, Vermont, uses the name Alpha Tolman. This farm won best in show in the 2018 American Cheese Society competition. Spring Brook Farm, in Reading, Vermont, uses the name Tarentaise Reserve. (Bardet Dec.¶ 21-23).

Arethusa Farms, a successful dairy in Connecticut, sells its “alpine-style” cheese under the name Mt. Tom. The company explains, “Inspired by the cheeses of the Swiss Alps and named for our own local alpine monolith (all 1,324’ of it!), Mt. Tom is sweet and nutty with a light, mouthwatering tang.” (<https://www.arethusafarm.com/mt-tom>). (Applicants’ Trial Exhibits 4 and

17). Arethusa Farm's Mt. Tom cheese is sold at the Farm's own retail stores, in cheese shops, and in supermarkets, including some Stop N Shop and Whole Foods stores. (Bardet Dec.¶ 24).

Cheese producers in Europe (outside of Switzerland and France) have virtually stopped using Gruyère as a name for cheese.

At his testimonial deposition, Thomas Gellert, President of Opposer Atalanta Corporation, identified a German company named Ammerlander as a source for German "Gruyère" cheese sold by his company. (Gellert Transcript, TTABVUE #31). His information was out of date. The Ammerland Dairy Company in Germany has changed the name of its cheese from "Ammerlander Gruyère" to "Ammerlander Alpine," and this name is used in the United States. (See printout of iGourmet website, Applicants' Trial Exhibits 5 and 18).

As Opposers have noted, some retailers in the U.S. have sold cheese made in Wisconsin, Germany and Austria under the "Gruyère" name. IDG has authorized its lawyers in the U.S. to write to these retailers to object to this misuse of the GRUYÈRE mark. Although not every retailer has complied with IDG's demands, the following major retailers have stopped using "Gruyère" for their private label cheese: Whole Foods, ConAgra Foods, Ralph's Supermarkets, Balducci's, Zabar's, Fairway Markets, Westside Markets, Pacific Cheese, Keystone Farm, LLC, Swiss-American, Inc., Rockhill Mountain Creamery, Rumiano Cheese Co., Burnett Dairy Cooperative (which supplies Costco), Chaseholm Farm Creamery, Peterson Company, Mandi Foods, Food Innovations, Inc., Cheezwarehouse.com, Inc., Kemco Foods Distributors, Caputo Cheese Market, and Mondo Projects, Inc. (Bardet Dec.¶ 26). Letters sent by IDG's attorneys and the responses from these entities are submitted as Applicants' Trial Exhibit 6. Included in these letters is IDG's attorneys' letter to the Wisconsin Milk Marketing Board and its response, noted above.

Although Opposers claim that “gruyere” cheese has been made in Hungary, Australia, Argentina, and Uruguay (Opposers’ Trial Brief (“OB”) p. 23), there is no evidence that cheese made in these countries is sold in the U.S. and therefore no evidence that any such sale has any impact on U.S. consumers.

Many of the sellers who have not agreed to stop using GRUYÈRE have acknowledged IDG’s pending Application, and have said they would reconsider if a registration were issued. Since IDG has a limited budget for its enforcement and litigation efforts, IDG is not in a position to commence litigation against these retailers, and therefore it has reserved its rights against these retailers and will revisit the matter if it prevails in this Opposition. (Bardet Dec.¶ 27).

Cheese competitions in the United States

Opposers submitted a declaration from John Umhoefer, the Executive Director of the Wisconsin Cheese Makers Association, which runs the World Championship Cheese Contest every two years. Attached to Mr. Umhoefer’s declaration are lists of categories in that competition, but neither the declaration nor Opposers’ Brief explains which cheeses are included in the categories. In the 2018 Contest, the category that includes “alpine style” cheeses made in the United States is called “Washed Rind/Smear Ripened Hard Cheeses.” No cheeses in this category use the name Gruyère. (Applicants’ Trial Exhibits 7 and 19). The contest also has a category called “Gruyere.” (Applicants’ Trial Exhibits 8 and 20.) This category is limited to cheeses sold under the mark GRUYÈRE. All but one of the cheeses in this category are produced in Switzerland and are entitled to use the GRUYÈRE certification mark. The one exception is a cheese made in Denmark by a producer named Bornholms Andelsmejeri. Opposers have not submitted any evidence that this Danish cheese is even sold in the United States, and IDG has not seen any evidence that it is sold in the U.S. (Bardet Dec.¶ 28). In short, among the hundreds

of entrants in the World Championship Cheese Contest, *no cheese made in the U.S. uses the name Gruyère*, and, with one minor exception, all the cheeses that use the name GRUYÈRE are *made in Switzerland*. Significantly, the Wisconsin Cheese Makers Association, like the Wisconsin Milk Marketing Board, did *not* oppose Applicants' application to register GRUYÈRE.

Similarly, in the American Cheese Society 2018 competition (a competition limited to cheese made in the U.S.) not one of the 365 cheeses in the competition was called "Gruyere." Instead, cheeses in the "washed rind" category used fanciful names for their "alpine style" cheeses. (Applicants' Trial Exhibit 9, 21) (Bardet Dec.¶ 29).

The Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) in Europe

On December 10, 1981, the Federal Council of Switzerland issued a "Decree on the protection of the names of Swiss Cheeses." This regulation listed GRUYÈRE as a protected designation, among twelve other cheeses, and defined the production requirements for GRUYÈRE cheese. This protected designation remained in effect until it was superseded by adoption of the Protected Designation of Origin for GRUYÈRE in 2001. (Lehmann Dec.¶ 4-5).

The Protected Designation of Origin ("PDO") and Protected Geographical Indication ("PGI") are used for agricultural products that traditionally have been produced in a particular geographic region. When used on a product, the PDO and PGI designations guarantee that the food product originates in the specific region and follows a particular traditional production process. PDO (or *Appellation d'origine protégée* ("AOP") in French) certifies the strongest link to the territory. It requires that the product come from a particular region, that the product's "quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors," and that *all* aspects of production, processing, and preparation originate from that region. PGI (or *Indication géographique protégée*

(“IGP”) in French) certifies the local know-how and the close link between the product and the place or region. For PGI registered products, *at least one* of the stages of production, processing or preparation must take place in the region. (Lehmann Dec.¶ 6).

These designations help to highlight the qualities and traditions associated with registered products and to assure consumers that these are the genuine products, not imitations seeking to benefit from the good name and reputation of the original. As a result, these geographic designations help producers and groups of producers market their products better, while providing them with legal protection from misuse or falsification of a product name. (Lehmann Dec.¶ 7).

Agreements between Switzerland and the European Union

On June 21, 1999, Switzerland, which is not part of the European Union, entered into the “Agreement between the European Community and the Swiss Confederation on Trade in Agricultural Products” (“Agreement on Agriculture”), which became effective on June 1, 2002. (Lehmann Dec.¶ 8).

The Agreement on Agriculture, which improved mutual market access, consists of a framework agreement (regulation of rules of origin, evolutionary and protective clause, settlement of disputes, and establishment of a Joint Committee), tariff concessions, agreements to eliminate technical barriers to trade, as well as explanations of various trade issues and products. (Lehmann Dec.¶ 9).

The Agreement on Agriculture simplifies trade in the agricultural sector by reducing or even eliminating non-tariff barriers to trade (arising from differing product regulations and import requirements). In this context, certain technical regulations in the areas of plant health, animal feed, seeds, organic farming, and wine and spirits, as well as quality norms for fruit and

vegetables are mutually recognized as being equivalent. Designations for wine and spirits are mutually protected; the protection of Swiss designations normally limited to Swiss territory is thus extended to the EU. (Lehmann Dec.¶ 10).

In December, 2011, an agreement on the mutual recognition of Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI) entered into force. The 2011 agreement was integrated into the Agreement on Agriculture as Annex 12, and provides that designations of food and agricultural products – for example, cheese products – are mutually recognized. (Lehmann Dec.¶ 11).

Representatives of the EU and Switzerland meet at least once a year within the Joint Committee on Agriculture. The Committee is responsible for the administration of the Agreement on Agriculture and ensures its proper implementation. (Lehmann Dec.¶ 12).

Process for Granting of PDO Designation in Switzerland

The PDO designation is granted in accordance with the following procedures.

Initially, Swiss producers in the region agree on precise specifications for the ingredients and processes involved in making the product. They will then seek protection at the national level in Switzerland. If the designation is protected at the national level, the producers or the state (that is, Switzerland) may then submit an application to the European Commission. The Commission examines the application and may or may not approve the application. The Commission will not approve the application if the term is a generic term. Under EU rules, generic terms are “names of products which, although relating to the place, region or country where the product was originally produced or marketed, have become the common name of a product in the [European] Union.” For example, Cheddar cheese was deemed to be a generic

name in the EU. Other cheese terms that have been held generic in the EU are Brie, Camembert, Edam, Emmentaler, and Gouda. (Lehmann Dec.¶ 14-15).

If the Commission approves the application, the term is published in the EU official Journal. Interested parties then have three months to file an opposition, with an additional two months to file a reasoned statement of the opposition. The Commission then has six months to resolve the opposition and either reject or approve the application. (Lehmann Dec.¶ 16).

In the case of GRUYÈRE, the term was first approved as a PDO in Switzerland in 2001, and then recognized in the agreement on the mutual recognition between the EU and Switzerland in 2011 for the entire EU territory. (Lehmann Dec.¶ 17).

PDO and PGI procedures in France

In France, these designations are under the jurisdiction of the French National Institute of Origin and Quality (or *Institut national de l'origine et de la qualité* (“INAO”). INAO is an administrative establishment within the French Ministry of Agriculture, Food, and Forestry. For the past eighty years, INAO has used its expertise to insure the recognition and protection of official indications of the quality and origin of agricultural, food and forestry products. (Guittard Dec.¶1-2).

INAO is responsible for the implementation of French policy on official indications of the origin and quality of agricultural, food, and forestry products. These indications are: appellation d'origine contrôlée (AOC), protected designation of origin (PDO), protected geographical indication (PGI), traditional specialty guaranteed (TSG), label rouge (LR) and organic farming (agriculture biologique (AB)). INAO follows European Union and international procedures concerning the protection AOC/PDO and PGI names. (Guittard Dec.¶ 3).

Among the products covered are wines, cheese, and other food products. INAO works with professionals in government agencies, as well as non-governmental accredited inspection bodies. For each product with a PDO or PGI designation, there is a control system for certifying that the product is produced in accordance with rigid specifications. For each product with an official indication of origin and quality, a control plan must be submitted and approved by INAO. INAO approves and assesses the independent bodies responsible for monitoring compliance with the specifications. (Guittard Dec.¶ 4).

Any organization that wishes to apply for an official indication of quality and origin must follow a detailed procedure. First, the organization files an application with INAO. Once the application is approved by the relevant committee within INAO, the specifications of the product under an indication of quality and origin are the subject of a two-month “national opposition” procedure, during which any interested person can submit an opposition to INAO. If an opposition is filed, INAO will proceed to make a decision either to grant or deny the opposition. (Guittard Dec.¶ 5).

In the case of the mark GRUYÈRE, a French application was made in 2010 to register GRUYÈRE as a PGI designation. The United States Dairy Export Council – one of the Opposers in this proceeding – filed an Opposition on the ground that the term is generic, raising arguments similar to those raised here, but the opposition was overruled and the application was granted. Accordingly, in 2012 INAO approved GRUYÈRE as a PGI designation for cheese produced in a limited area of France. (Guittard Dec.¶ 6). Specifically, the production of the milk and the processing and maturation of the cheese must occur in a limited area of France in accordance with the French specifications (Applicants’ Trial Exhibit 10). GRUYÈRE continues to be protected as a PGI in France, the EU, and Switzerland to this day. (Guittard Dec.¶ 6).

Consumers in the United States will be confused if the GRUYÈRE certification mark is not protected.

Opposers claim that GRUYÈRE is a generic term for “a type of cheese” that is produced in “several different areas of the world” and that these cheeses are “readily available” in the United States. Notice of Opposition in Opposition No. 91232427, ¶¶ 12, 15-17. That is not true. As noted above, Opposers have submitted evidence of *only three* makers of cheese that is sold under the name “Gruyère” in the U.S. and that is not made in Switzerland or France. These are

(1) Roth Cheese in Wisconsin, which has *stopped* using GRUYÈRE as the name for cheese it sells under its own brand. (Bardet Dec.¶ 17). Although Roth Cheese continues to sell cheese in bulk to retailers and distributors, some of whom continue to label the cheese as “Gruyère,” many of these retailers have stopped using the name “Gruyère,” or are waiting for the outcome of this proceeding. (Bardet Dec.¶ 26-27);

(2) Ammerland in Germany, which has stopped using the name “Gruyère,” and which now calls the cheese “Alpine Style.” (Bardet Dec.¶ 25); and

(3) A supplier in Austria that sells cheese to Atalanta, which Atalanta sells under the name “Alps Gruyere.” Atalanta’s labels do not even mention that the cheese is made in Austria, except in small print on the back of the package. (Gellert Transcript, p. 30-31).

Opposers have not submitted any evidence to show that the use of “Gruyère” by these three sellers has caused GRUYÈRE to lose all significance as a mark indicating cheese made in the Gruyère region of Switzerland and France.

Based on the experience of IDG’s President, U.S. consumers know that GRUYÈRE cheese is made in Switzerland, and know its unique taste. Indeed, there has been actual confusion as a result of the use of the mark GRUYÈRE for cheese made in Wisconsin. See Applicants’ Trial Exhibit 12, an Internet blog post, written by an author who appears to be an experienced food

writer. The author says, “I went to Trader Joe’s and picked up two packages of Gruyere: one was a Swiss Gruyere aged at least six months and the other was a Swiss Gruyere aged for at least a year.” (Applicants’ Trial Exhibit 12, Page 2-3). However, the “six month” cheese was in fact made in Wisconsin, not Switzerland. (Id.)

SUMMARY OF ARGUMENT

Applicants seek to protect GRUYÈRE as a certification mark for cheeses that are “widely considered among the greatest of all cheeses” (Applicants’ Trial Exhibit 11). Opposers bear the burden of showing by “persuasive and clear evidence” that GRUYÈRE is a generic term. 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 12:12 (5th ed. 2019) (hereinafter “*McCarthy*”). That is, Opposers must show that GRUYÈRE has “lost all significance as a mark.” *Tea Bd. of India v. Rep. of Tea, Inc.*, 80 U.S.P.Q.2d 1881, 1888 (T.T.A.B. 2006). Opposers have failed to meet their burden. Not only do Opposers lack evidence to support their claim, but also they base their argument chiefly on a fictitious claim that Applicants somehow “acquiesced” in the generic use of GRUYÈRE by third parties, a claim that Opposers repeat nearly a dozen times in their brief.

Opposers have no need to use GRUYÈRE on their cheese. Apparently, they hope to have GRUYÈRE declared generic so that they can take a free ride on the centuries-old goodwill of GRUYÈRE cheese.

ARGUMENT

Tellingly, Opposers never acknowledge that they have the burden of proof in this proceeding, and never address the high degree of proof that must be submitted before a certification mark will be deemed generic. Opposers have not met their burden, and therefore the Opposition should be dismissed and judgment should be entered for Applicants.

I. OPPOSERS BEAR THE BURDEN OF PROOF.

Applicants filed Application Ser. No. 86759759 to register the certification mark GRUYÈRE for use in connection with cheese. Opposers filed notices of opposition seeking to block the registration of the GRUYÈRE mark on the ground that the mark is generic. *See* Notice of Opposition in Proceeding No. 91232427 (“The proposed GRUYÈRE certification mark is composed entirely of a generic term for a type of cheese in violation of Section 2(e)(1) of the Lanham Act, 15 U.S.C. § 1052(e)”) (TTABVUE Docket No. 1, ¶ 11).

Opposers bear the burden of proving that GRUYÈRE is a generic term. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1300 (2015) (“The party opposing registration bears the burden of proof, see § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. § 1063(b).”); *Sanyo Watch Co. v. Sanyo Electric Co.*, 215 U.S.P.Q. 833, 834 (Fed. Cir. 1982) (Opposer bears both “ultimate burden of persuasion” and burden of “going forward with sufficient proof of material allegations of Notice of Opposition”); *Hoover Co. v. Royal Appliance Mfg. Co.*, 57 U.S.P.Q.2d 1720, 1722 (Fed. Cir. 2001); 3 *McCarthy* § 20:3 (“In an opposition proceeding, the opposer, as the party in the position of a plaintiff, has the burden of proof to establish that applicant does not have the right to register its mark.”)

In this proceeding, it is Opposers’ burden “to demonstrate by a preponderance of the evidence that [Applicants’ mark] is generic, or that the mark has become generic as a result of opposer’s failure to exercise control over use of the mark.” *Tea Bd. of India*, 80 U.S.P.Q.2d at 1887 (citing *Magic Wand Inc. v. RDB Inc.*, 19 U.S.P.Q.2d 1551, 1553 (Fed. Cir. 1991) and *Stocker v. Gen. Conference Corp. of Seventh-day Adventists*, 39 U.S.P.Q.2d 1385, 1392 (T.T.A.B. 1996)). In other words, it is Opposers’ burden to show that “members of the relevant public primarily use or understand” GRUYÈRE to be a generic term. *In re Trek 2000 Int’l Ltd.*, 97 U.S.P.Q.2d 1106, 1113 (T.T.A.B. 2010). If the record as a whole leaves the Board in doubt as

to whether the term is generic, the Board is “constrained to resolve that doubt in favor of applicant.” *Id.* Applicants have no burden to show that the mark is not generic.

Significantly, Opposers’ brief nowhere mentions that they have the burden of proving that the mark is generic.

II. TO PREVAIL, OPPOSERS MUST SHOW THAT GRUYÈRE HAS “LOST ALL SIGNIFICANCE” AS A MARK, WHICH OPPOSERS CANNOT DO.

To prove that GRUYÈRE is generic, Opposers are required to show that the mark has “lost all significance as a mark.” *Tea Bd. of India*, 80 U.S.P.Q.2d at 1888 (emphasis added). This must be shown by substantial and “clear evidence.” *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 U.S.P.Q.2d 1141, 1143 (Fed. Cir. 1987). As Professor McCarthy explains, “Because a finding of genericness may result in the loss of rights which could be valuable intellectual property, a court should not find genericness *without persuasive and clear evidence* that the contested term has become generic among *a majority of the buyer group.*” 2 *McCarthy* § 12:12 (emphasis added).

Tea Board of India is directly on point here. In *Tea Board of India*, the opposer was a non-trading, non-profit body established by the Government of India under the India Tea Act of 1953 for the purpose of controlling the Indian tea industry. Darjeeling is a district located in the state of West Bengal, India, where tea has been grown and produced in 87 “tea gardens” for 150 years. The applicant in that case, Republic of Tea, was a California-based seller of teas. Republic of Tea counterclaimed to cancel the opposer’s registration for the DARJEELING word mark, contending that the mark “has lost its significance as an indication of geographic source and among the consuming public has become a generic term denoting a certain type of tea.” 80 U.S.P.Q.2d at 1886. In support of its position that the DARJEELING mark was generic,

Republic of Tea pointed to the Tea Board's alleged failure to police its marks, years of uncontrolled use, deficiencies in the Tea Board's regulations, and other factors. It also submitted dictionary definitions, survey results, and evidence of third-party usage. *Id.* at 1886-87.

The TTAB said, "A certification mark used to certify regional origin as well as qualities and characteristics associated with the origin will not be deemed to have become a generic term as applied to particular goods unless it has lost its significance as an indication of regional origin for those goods." *Id.* at 1887. The TTAB dismissed as irrelevant the dictionary definitions and evidence of third-party misuse, holding:

[E]ven assuming applicant had produced evidence of misuse, that is, use indicating a different geographic source for the tea or use in connection with nongenuine tea, we will not infer that the mark has become generic unless it is also shown by applicant that the misuse is so widespread and of such duration that it has caused DARJEELING to lose *all significance as a mark*.

80 U.S.P.Q.2d at 1893 (emphasis added). Applying this test, the TTAB found "insufficient probative evidence in the record to establish that the DARJEELING word mark is generic." *Id.* at 1896. It dismissed the cancellation counterclaim. *Id.*

The Board reaffirmed this rule in *Swiss Watch International, Inc. v. Federation of the Swiss Watch Industry*, 101 U.S.P.Q.2d 1731, 1743-44 (TTAB 2012). In *Swiss Watch*, it held that the Petitioner must show more than instances of misuse by third parties; the instances must be "so extensive for us to conclude that the registration should be cancelled." 101 U.S.P.Q.2d at 1741. That is, the evidence must show that the misuse was so extensive that the certification mark "lost all significance as a mark." *Id.* (quoting *Tea Bd. of India*, 80 U.S.P.Q.2d at 1888).

Remarkably, Opposers do not acknowledge the requirement that they must show that GRUYÈRE "lost all significance as a mark." Opposers do not want to acknowledge this requirement because they know they are unable to prove that GRUYÈRE has lost all significance

as a mark. The undisputed evidence, including Opposers' own evidence, shows that, to a significant number of consumers and cheese makers, GRUYÈRE is a specific cheese made in a specific region of Switzerland and France, and is not a generic term.

III. OPPOSERS CLAIM THAT APPLICANTS “ACQUIESCED IN WRITING” TO THE SALE BY THIRD PARTIES OF “U.S. MADE GRUYERE UNDER THE NAME ‘GRUYERE.’” THIS CLAIM IS BLATANTLY FALSE.

Opposers argue that Applicants “have acquiesced in writing . . . to [Emmi Roth] selling U.S. made gruyere under the name ‘gruyere’” (OB p. 7), “have condoned the sale of U.S.-made gruyere under the name ‘gruyere,’” (Id.), made an “express acknowledgement” of Emmi Roth “selling U.S.-made Gruyere,” (OB p. 8), “acknowledged” that Emmi Roth’s “expressly reserved the right to private label U.S. made cheese as ‘gruyere,’” (OB p. 9), “acknowledge[d] in writing that a third-party can freely use the mark on products the owner knows will not satisfy its stated certification standards” (OB p. 12), “*actually knew*” Emmi Roth’s cheese would not meet Applicant’s standards, (OB p. 9) “acknowledged and condoned – indeed by written documentation –[that] this would occur,” (OB p. 9-10), and that, with “Applicant’s acquiescence,” Emmi Roth continues to label and sell “U.S.-made gruyere.” (OB p. 12).

None of the quoted statements are true. In making these claims, Opposers willfully misread an agreement between the Swiss Applicant and Emmi AG, the parent of Emmi Roth. The agreement (OB. p. 33-34) says that “IDG [the Swiss Applicant] is taking the necessary steps to register Gruyère as a trademark in the United States.” The agreement goes on to confirm that Emmi Roth will cease “use of Gruyère as brand name.” Opposers do not dispute that Emmi Roth discontinued use of GRUYÈRE on cheese it sold to the public, replacing GRUYÈRE with the mark GRAND CRU. (This is also confirmed in a letter from Emmi Roth. (Opposers’ Trial Exhibit 68, Part 1(Resp. to Office Action, Ex. A))

The agreement says that Emmi Roth “will provide its customers with all necessary information” concerning the GRUYÈRE certification mark, but will not assume the obligation to control or inspect its customers’ packaging, and disclaims any responsibility for any misuse of GRUYÈRE by its customers. The agreement does not say that Emmi Roth’s customers may use GRUYÈRE on cheese made in the U.S. The agreement does not say that Emmi Roth will provide its customers with labels bearing the GRUYÈRE mark for sale to consumers. The agreement does not say that Emmi Roth’s customers will in fact use GRUYÈRE on their cheese. Thus, *nothing* in the agreement constitutes acquiescence, acknowledgement, or condonation by Applicants of use of GRUYÈRE on cheese made in the U.S.

Opposers know that Applicants have *not* acquiesced in or condoned any use of GRUYÈRE by retailers for U.S.-made cheese, and have strenuously objected to any such use. Opposers know that Applicants have sent dozens of demand letters, and have received responses from numerous retailers agreeing to discontinue such use. Among the retailers who have discontinued use of GRUYÈRE on U.S.-made cheese are: Whole Foods, ConAgra Foods, Ralph’s Supermarkets, Balducci’s, Zabar’s, Fairway Markets, Burnett Dairy Cooperative (which supplies Costco), and many more. (See p. 13 above). In addition, Emmi Roth, the largest maker of what was formerly called Wisconsin “Gruyere,” now calls its cheese Roth GRAND CRU, as do numerous artisanal cheese makers in Wisconsin and elsewhere. The Wisconsin Milk Marketing Board website no longer uses GRUYÈRE as the name for a cheese made in Wisconsin. Instead, it uses the term “Alpine Style.” The Wisconsin Cheese Makers Association, which runs the World Championship Cheese Contest, uses “washed rind” for the category of “alpine-style” U.S.-made cheese. Ammerland Dairy, in Germany, stopped using “Gruyere” on its cheese. In short, as a result of Applicants’ extensive enforcement efforts, cheese makers know that

GRUYÈRE is a certification mark for cheese made in the GRUYÈRE region of Switzerland and France, and they respect this designation.

A. Opposers have no evidence to support their bogus claim that “millions of pounds of U.S.-made” cheese have been labeled “Gruyère.”

Opposers repeatedly claim that “Emmi Roth . . . has . . . produced and labelled as gruyere millions of pounds of U.S. made gruyere in recent years” (OB p. 3), that Emmi Roth “is currently selling millions of pounds of U.S.-made cheese labeled gruyere in the United States” (Id. at 7), that a spreadsheet provided by Emmi Roth, showing wholesale sales, proves that millions of pounds of U.S. made cheese is “still labelled as gruyere.” (Id. at 8). Opposers willfully misread the Emmi Roth spreadsheet.

Emmi Roth sells cheese in two ways: (1) under its own ROTH brand and (2) unbranded bulk cheese that retailers can package in consumer-size portions and sell under the retail chain’s own brand. Emmi Roth refers the latter as “private label.” In 2013, Emmi Roth stopped using the designation ROTH Gruyere for its U.S.–made cheese and started using the designation ROTH GRAND CRU instead. (Opposers’ Trial Ex. 68, Part 1 (Resp. to Office Action, Ex. A)). In response to a subpoena from Opposers in this proceeding, Emmi Roth produced a spreadsheet showing the number of pounds in each category of cheese it sold annually from 2012 to 2016. Opposers assume – without any evidence – that retailers sold every pound of “private label” cheese to consumers using labels that say “gruyere.” The spreadsheet, however, shows only the amount of sales from Emmi Roth to retailers. It says *absolutely nothing* about how the cheese was labelled when it was sold by retailers to consumers. Opposers have no evidence to show how many pounds of “private label” U.S.-made cheese were sold to consumers bearing labels bearing the term “gruyere,” as opposed to other terms, such as “Alpine-Style cheese,”

“Mountain-Style cheese,” or some other term. Opposers know that not all such cheese was sold using the designation “gruyere” because they know that Whole Foods, Ralph’s Supermarkets, Balducci’s, Zabar’s, Fairway, and numerous other retailers have, like Emmi Roth itself, *stopped* using the designation “gruyere” or never used that designation in the first place. Yet Opposers falsely and repeatedly claim that every pound of “private label” cheese made by Emmi Roth is ultimately “labeled gruyere.” (OB pp. 3-8).

Since Opposers have no evidence as to how much “private label” cheese was sold to consumers by retailers under the “gruyere” designation, and no evidence of the market share of such “private label” cheese, Opposers obviously cannot say what impact, if any, its sale had on U.S. consumers.

IV. APPLICANTS HAVE MADE EXTENSIVE, SUCCESSFUL EFFORTS TO CONTROL THE USE OF THE CERTIFICATION MARK

Opposers argue that Applicants’ attempts to “control” the use of their certification mark in the U.S. “have been inconsistent, incomplete, unsuccessful, and misleading.” (OB p. 5). In making this argument, Opposers rely on Section 14(5)(A) of the Trademark Act, 15 U.S.C. § 1064, which says that a certification mark may be cancelled if the registrant does not control, or is not able legitimately to exercise control over the use of the mark. Opposers ignore the governing standard for what constitutes “control.”

In *Swiss Watch International*, the Board noted that although the statute does not define “control,” case law has interpreted “failed to control” in two ways. 101 U.S.P.Q.2d at 1739. The first interpretation is that a registrant may have failed to control the use of the certification mark by its own members. Here, Opposers do not in any way challenge the extensive evidence showing that Applicants control the use of the mark by their members in Switzerland and France.

There is no dispute that Applicants' members adhere to Applicants' rigorous standards for making and aging GRUYÈRE cheese, thus assuring that GRUYÈRE cheese has a taste that is uniquely associated with the GRUYÈRE geographic region. Opposers ignore this aspect of control because they know they can never duplicate the geographic conditions and traditional cheese-making methods that make the taste of genuine GRUYÈRE cheese unique. Opposers want to be able to use the GRUYÈRE name and the goodwill attached to it, but without equaling the quality of GRUYÈRE cheese.

The second interpretation is that the owner of the mark may have failed to control use by third parties to such an extent that the mark has become generic. *Swiss Watch*, 101 U.S.P.Q.2d at 1731 (citing *Tea Bd. of India*, 80 U.S.P.Q.2d at 1886). In *Swiss Watch*, the Board said that "absolute control is not only not required," but also that "absolute control would be impossible," 101 U.S.P.Q.2d 1740 (citing *Tea Bd. of India*, 80 U.S.P.Q.2d at 1888). To the same effect are *Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories Inc.*, 15 U.S.P.Q.2d 1359, 1362 (Fed. Cir. 1990) (certification mark owner's affirmative duty to control certification mark does not mean "absolute control" since this would be "impracticable, if not impossible to satisfy") and *Engineered Mechanical Services, Inc. v. Applied Mechanical Technology, Inc.*, 223 U.S.P.Q. 324, 332 (M.D. La. 1984) ("The owner of a mark is not required to constantly monitor every nook and cranny of the entire nation and to fire both barrels of his shotgun instantly upon spotting a possible infringer"); see also *Wallpaper Mfrs. Ltd. v. Crown Wallcovering Corp.*, 214 U.S.P.Q. 327, 336 (C.C.P.A. 1982) ("an owner is not required to act immediately against every possibly infringing use").

The Board in *Swiss Watch* went on to say, "The question is whether the control is adequate." 101 U.S.P.Q.2d 1740. The Board in that decision held that even though the registrant's

monitoring and enforcement system did not provide absolute control, it was adequate in the circumstances of the case. Here, too, Opposers have made substantial and successful efforts to control use of GRUYÈRE by unauthorized third parties, and Opposers cannot show that GRUYÈRE has “lost all significance as a mark.”

A. Applicants’ efforts to control the mark have been consistent.

Opposers argue that Applicants’ efforts to control the use of the mark have been “inconsistent.” They argue that the Swiss Applicant asserted for years that GRUYÈRE cheese “could be produced only in Switzerland and nowhere else, *not even France*,” but that “[t]he Swiss Applicant has drastically changed position in the present application: it now claims that ‘gruyere’ certifies a cheese made in Switzerland *or France*.” (OB pp. 13-14, emphasis in original; see also OB pp. 27-28). Opposers’ argument is false, and ignores the documentary evidence. As Opposers know, since 1981, GRUYÈRE has been a protected designation for cheese made in the Gruyère region of Switzerland bordering France. (Lehmann Dec. ¶ 4). In 2012, France recognized that GRUYÈRE cheese, made in the same region, but on the French side of the border, which shares the same mountainous characteristics as the Swiss side, was also entitled to protected status. The French certification standards are substantially similar to the Swiss standards.

The Application that is the subject of this proceeding simply recognizes that the GRUYÈRE region straddles the two countries. There is no inconsistency in position. Applicants do not claim that GRUYÈRE may be used on cheese made in all regions of France or in all regions of Switzerland. Rather, they assert that it may be made only in the limited Gruyère region, only in accordance with the Applicants’ standards, and only under Applicants’ supervision. Indeed, that the GRUYÈRE certification mark covers a particular mountainous region, a region that happens

to straddle the border of two countries, shows that the certification mark is tied to the land, and not to an artificial border on a map. Genuine GRUYÈRE cheese has a taste and aroma that can only come from that region, because of the unique flora consumed by the cows, the unique microorganisms used in creating and aging the cheese, and the centuries-old methods associated with it. *See Tea Bd. of India*, 80 U.S.P.Q.2d at 1887 (“we note that DARJEELING is used to certify regional origin of the tea and, *as is often the case with geographical indications, the mark also certifies certain qualities and characteristics of the product that are due to factors associated with the geographic region.*”) (emphasis added).

Opposers assert that the French and Swiss specifications are not identical. (OB p. 28). Opposers fail, however, to show through expert testimony or otherwise that these minor differences are in any way material and that they caused GRUYÈRE to lose all significance as a mark.

In short, Opposers utterly fail to explain how the addition of SIG as an Applicant has misled the public or caused GRUYÈRE to lose all significance as a mark.

B. Opposers’ reliance on FDA regulations has no merit.

Opposers argue that “*Applicants . . . have done nothing to challenge, change, or clarify an obvious hurdle to their registration: a US federal regulation, 21 C.F.R. § 133.149, that defines gruyere cheese without reference to origin.*” (OB pp. 15-16, see also p. 22). This argument has no merit. First, Opposers cite no case holding that Applicants have any obligation to “challenge, change, or clarify” this regulation. Second, Opposers fail to explain how this regulation is an “obvious hurdle” to the Application. The USPTO Examiner did not cite this regulation as a “hurdle” to the Application. Indeed, as Opposers themselves admit, the USPTO has registered ROQUEFORT as a certification mark even though “Roquefort,” like “Gruyere,” is subject to an

FDA standard. *See* 21 C.F.R. § 133.184; *Cmty. of Roquefort v. William Faehndrich, Inc.*, 131 U.S.P.Q. 435, 436-37 (S.D.N.Y. 1961) (ROQUEFORT indicates geographic source and methods for production and manufacture associated with that region).

Opposers do not claim that the FDA regulation *requires* any U.S. cheese manufacturer to use “gruyere” on labelling for cheese, and Opposers know that U.S. cheese manufacturers are not required to use “gruyere” on labelling for cheese. Emmi Roth discontinued use of “gruyere” on cheese and now uses GRAND CRU instead. Many other cheese makers and sellers have discontinued using “gruyere” or never used it in the first place. There is no evidence that the FDA has ever objected to the use by cheese makers of “Grand Cru,” “Alpine-Style cheese,” “Mountain-Style cheese,” or any other designation instead of “gruyere.”

Third, the U.S. Supreme Court has made clear that the FDA regulations are not a hurdle to the registration of the GRUYÈRE certification mark. *Pom Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 114 (2014), holds that a statutory private right of action for trademark infringement under the Trademark Act is not precluded by regulatory provisions of the Food, Drug, and Cosmetic Act. Opposers have no convincing response to the *Pom Wonderful* decision (which they bury in a footnote, OB p. 16). Their only response is to repeat their unsupported argument that Applicants were somehow obligated to “try to amend, revise, or clarify the FDA standard of identity.” Opposers do not explain why the owners of the ROQUEFORT certification mark were not required to “try to amend, revise, or clarify the FDA standard of identity.”

Finally, Opposers present no evidence that the public is aware of the text of this FDA regulation, and thus the regulation could not have any impact on the public’s understanding of the mark GRUYÈRE. Indeed, in *POM Wonderful*, the Supreme Court noted the FDA’s limited “perspective or expertise in assessing market dynamics.” 573 U.S. at 115. For all these reasons,

the FDA regulation does not render GRUYÈRE a generic term and the FDA regulation is not a hurdle to registration of GRUYÈRE. Opposers have the burden of proving that GRUYÈRE is generic, which they are unable to do.

C. Applicants' efforts to police the mark have been successful and extensive.

In *Tea Board of India*, the Board relied on “[e]vidence of opposer’s continuing efforts to maintain control of the mark and protect its value as a geographical indication.” 80 U.S.P.Q.2d 1889 (citing *Zimmerman v. Nat’l Ass’n of Realtors*, 70 U.S.P.Q.2d 1425 (T.T.A.B. 2004) and *University Book Store v. Bd. of Regents of the Univ. of Wis. Sys.*, 33 U.S.P.Q.2d 1385 (T.T.A.B. 1994)). In this case, Applicants have sent out numerous demand letters, which in many instances have resulted in “Gruyère” being eliminated from the packaging, once the Applicants’ rights in the mark were explained.

Opposers do not dispute that Wisconsin Milk Marketing Board website no longer uses GRUYÈRE as the name for cheese made in Wisconsin and instead uses the “Alpine Style”; that dozens of U.S. supermarket chains have stopped using GRUYÈRE for domestic cheese; that the largest U.S. maker of “domestic gruyere,” Emmi Roth, has stopped using GRUYÈRE on cheese it sells under its own brand; that U.S. artisanal cheese makers do not use “gruyere,” and instead use “Alpine-style” or fanciful names like “Pleasant Ridge Reserve”; that the Wisconsin Cheese Makers Association no longer has a category called “gruyere” for cheese made in the U.S.; and that Ammerland Dairy Company in Germany has changed the name of its cheese sold in the U.S. from “Ammerlander Gruyère” to “Ammerlander Alpine.” (See pages 11-15 above).

Opposers nevertheless argue, without any evidence, that “*Applicant did not object to the use of ‘gruyere’ by the vast majority of U.S. producers and sellers.*” (OB p. 17), and that “*Applicants’ control efforts have been unsuccessful.*” (*Id.*). Opposers do not explain how they came up with

the phrase “vast majority.” In fact, the record is devoid of any evidence as to how much non-genuine GRUYÈRE cheese is actually sold in the U.S., what its market share may be, and what effect, if any, its sale has actually had on U.S. consumers. Opposers’ abject failure to provide such evidence – as well as their failure to provide any statements or testimony from consumers – is particularly telling, given Opposers’ burden to show “that the contested term has become generic among *a majority of the buyer group*.” 2 *McCarthy* § 12:12 (emphasis added).

Moreover, Opposers do not dispute that absolute control is not required. *Swiss Watch*, 101 U.S.P.Q.2d at 1740, and therefore 100% success in sending demand letters is not required. In *Unique Motorcars v. Carroll Hall Shelby Trust*, Opp. Nos. 91150352 & 91155242, 2009 WL 722046, at *7 (T.T.A.B. Mar. 4, 2009), the Board declined to find that Applicant’s trademarks for automobile configurations were generic in spite of the opposer’s contention that “dozens” of third parties had manufactured and sold replicas of applicant's designs without any control or permission from Applicant. The Board noted that “a party need not police every potential infringing third-party use.” *Id.* (citing *BellSouth Corp. v. DataNational Corp.*, 35 U.S.P.Q.2d 1554 (Fed. Cir. 1995)); 3 *McCarthy* § 17:17. Specifically, the Board found that Applicant “made some effort to protect the configurations which are identified in the subject applications,” and that “[t]his evidence of policing favors applicant and weighs against opposer’s claim that the configurations are generic.” *Id.* at *8.

Further, Opposers’ attempt to show that “Applicants’ control efforts have been unsuccessful” is based on incorrect information. At OB 17-18, Opposers list a number of businesses which, Opposers’ claim, have not discontinued use of “gruyere” for non-genuine cheese. Some of the names on Opposers’ list are duplicates. For example, Boar’s Head and Frank Brunckhorst are the same company. Ralph’s Supermarkets, a large California chain, has in fact discontinued use of

“gruyere” for Wisconsin cheese (Applicants’ Trial Exhibit 6 at GRUY 1551) (counsel for Ralph’s says, “Ralphs is in the process of changing its product labeling and signage to remove the word GRUYERE from domestic cheese, as requested”). Food Innovations also discontinued such use (Applicants’ Trial Exhibit 6 at GRUY 1763) (Food Innovations officer says, “I sincerely apologize for this unintentional error. We have made the suggested correction”), as did Mandi Foods (Applicants’ Trial Exhibit 6). Opposers’ website printouts simply show that although these retailers have stopped use of “Gruyere” on their own cheese, they may still continue to sell Boar’s Head’s cheese. As Opposers acknowledge, in some cases Applicants’ claim letters, such as its letter to Boar’s Head, are “not resolved.” This is because the recipient of the cease and desist letter said they would wait for the outcome of this proceeding. Opposers cite no case holding that a letter from a retailer indicating they will wait for the outcome of an opposition proceeding renders a mark generic.

D. Opposers’ falsely claim that “Applicants’ control efforts rely on misleading information.”

A number of the cease-and-desist letters sent by Applicants’ counsel say that Emmi Roth has discontinued the use of “Gruyère” on its Wisconsin-made cheese, and urge the recipients of the letters to do likewise. Opposers’ claim these letters are misleading because “Emmi Roth continues to manufacture gruyere cheese in the U.S. and label and sell it as gruyere to third parties, with the Swiss Applicant’s acquiescence.” (OB at 19). As explained in detail above, Opposers’ claim is false. (See pages 25-27 above).

E. The French Applicant rigorously controls the use of the mark.

Opposers falsely claim that “the French Applicant has not done a single thing to control the mark.” This, too, is false. The French Applicant rigorously controls use of the certification mark

by cheese makers and affineurs in France, in according with the French Standards. (Sandoz Dec. ¶¶ 2-6). Although many of the U.S. cease-and-desist letters were sent on behalf of the Swiss Applicant, this is not surprising, given that more Swiss GRUYÈRE cheese is sold in the U.S. than French GRUYÈRE. Opposers do not explain how this fact supports their argument that Applicants allegedly do not control the mark in the U.S. Moreover, many letters were sent on behalf of both the Swiss and French applicants.

F. Numerous dictionaries and other authorities show that GRUYÈRE is not generic; Opposers' dictionary evidence is at best ambiguous.

Opposers have submitted excerpts from three dictionaries which, they claim, show that GRUYÈRE is a generic term, as well as a fourth reference that consolidates other references. (OB p. 24). Opposers fail to acknowledge that the Board also has before it dictionary definitions offered by Applicants, and the Board should consider *all* the dictionary evidence, not just Opposers'. Further, if, when viewed as a whole, the dictionary evidence is ambiguous, the Opposers have failed to meet their burden of proof, and the mark should be registered. In *Tea Board of India*, the applicant, in support of its counterclaim, submitted dictionary definitions purporting to show that Darjeeling was a generic term. The Board held that some of those dictionary entries were ambiguous, while "a number of the dictionaries reference Darjeeling as the exclusive geographic source of tea from that region." Reviewing all the dictionary entries, the Board concluded that they "fail to show that Darjeeling has a generic meaning." 80 U.S.P.Q.2d at 1895. Similarly, in *In re Dakota Cub Aircraft, Inc.*, Ser. No. 78705733, 2009 WL 1017276, at *4 (T.T.A.B. Mar. 25, 2009), where the evidence, including a dictionary definition, was "ambiguous on the question of whether CUB is used [for airplanes] as a trademark or as a descriptive or

generic term,” the Board held that CUB “serves a source-identifying function and is not a generic term.”

Here, the dictionary evidence strongly favors Applicants. Opposers do not dispute the authoritative sources Applicants produced. For example, the Merriam-Webster online dictionary defines Gruyère as “a firm cheese with small holes and nutty flavor *that is of Swiss origin.*” (Opposers’ Trial Exhibit 68, Part 2 (Resp. to Office Action, at pp. 4-8)) (emphasis added); the Free Dictionary defines “Gruyère cheese” as “A kind of cheese made at Gruyère, Switzerland” (*Id.*) and Wikipedia defines “Gruyère (cheese)” as “a hard yellow cheese, named after the town of Gruyères in Switzerland, and originated in the cantons of Fribourg, Vaud, Neuchatel, Jura and Berne” (*Id.*).² The Encyclopedia Britannica gives the following definition: “**Gruyère**, hard cow’s-milk cheese produced in the vicinity of La Gruyère in southern Switzerland and in the Alpine Comté and Savoie regions of eastern France.” (<https://www.britannica.com/-topic/Gruyere>).³

Further, the Oxford Companion to Cheese states that GRUYÈRE is an Appellation of Origine Controlée, for “a cheese from Switzerland” (TTABVUE # 35, Applicants’ Notice of

² Opposers’ own evidence includes similar definitions. See definition of “Gruyere Cheese” in Opposers’ Trial Exhibit 90 at p. 000357: “A *Swiss* cow’s milk cheese with a golden brown rind and a firm, pale yellow interior.” (Emphasis added).

³ The Board may take judicial notice of the Britannica entry. The Board has consistently held that it may take judicial notice of dictionary and encyclopedia definitions. *Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 U.S.P.Q.2d 1066, 1075 n.17 (T.T.A.B. 2011) (citing *Univ. of Notre Dame du Lac v. J. C. Gourmet Food Imps. Co.*, 213 U.S.P.Q. 594 (T.T.A.B. 1982), *aff’d*, 217 U.S.P.Q. 505 (Fed. Cir. 1983)); *see also, e.g., In re Red Bull GmbH*, 78 U.S.P.Q.2d 1375, 1378 (T.T.A.B. 2006) (“As a general rule, the Board may take judicial notice of dictionary evidence.”); *Cont’l Airlines, Inc. v. United Air Lines, Inc.*, 53 U.S.P.Q.2d 1385, 1393 (T.T.A.B. 1999) (taking judicial notice of dictionary definitions even though not made of record by either party to an opposition proceeding); *UMG Recordings Inc. v. Matte, Inc.*, 100 U.S.P.Q.2d 1868, 1874, 1879 n.12 (T.T.A.B. 2011); *In re Broyhill Furniture Indus. Inc.*, 60 U.S.P.Q.2d 1511, 1514 n.4 (T.T.A.B. 2001).

Reliance Ex. 11 at p. 333), the best of which “are widely considered among the greatest of all cheeses.” The Oxford Companion to Cheese does not describe GRUYÈRE as a generic term. In contrast, it clearly states that other cheese names are generic terms. See for example, page 131: “‘Cheddar’ has become a generic term encompassing a vast range of hard cheeses. . . Cheddar is all things to all people.” See also, page 690: “Swiss cheese is the American-born generic term for a category of cheeses, manufactured and sold primarily in the United States . . .” Opposers do not dispute the admissibility or accuracy of the Oxford book; rather, they simply ignore it. But the Board should consider *all* the evidence. *Tea Bd. of India*, 80 U.S.P.Q.2d at 1895 (“In any event, a number of the dictionaries reference Darjeeling as the exclusive geographic source of tea from that region.”).

Moreover, all four of Opposers’ dictionary exhibits actually support Applicants’ position, because they all explain the derivation of the Gruyère name: the Gruyère region in Switzerland, the place where the cheese originated. None of the dictionaries mention any other geographic source for GRUYÈRE cheese, and none of the dictionaries say that Gruyère is merely a type of cheese that can be made anywhere. Finally, all of them capitalize Gruyère. *Id.* at 1896 (“We also note that, while not determinative, Darjeeling is always capitalized in these references.”)

Opposers’ other evidence of alleged generic use of GRUYÈRE also fails. First, much of the evidence (OB 23-25) is inadmissible because, for example, it is not properly authenticated, constitutes hearsay, or includes statements made without personal knowledge. (See Applicants’ separate Statement of Evidentiary Objections). Not only is this evidence inadmissible, but also it does not show generic use. For example, Opposers’ Trial Exhibit 80 is printed in a foreign language, and Opposers have not provided a translation. Opposers’ Trial Exhibit 84, a cheese

catalog, is out of date: it mentions Roth's Wisconsin "Gruyere," but Roth has since changed the name to GRAND CRU.

Opposers' Trial Exhibit 89 consists of snippets of articles about restaurant menu items that mention "gruyere." The Board has said, "Truncated results from search engines are entitled to little weight." *Dakota Cub*, 2009 WL 1017276, at *3 (citing *In re Bayer Aktiengesellschaft*, 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007)). In *Dakota Cub*, the Board gave no weight to truncated search summaries, holding that they "do not provide sufficient context." *Id.* Moreover, Opposers assume that none of the restaurants mentioned in these articles use genuine GRUYÈRE cheese in their dishes, but there is no basis for that assumption. Opposers' assumption seems to be based on nothing more than the use of the lower-case "g" in "gruyere." As the Board said in *Tea Board of India*, this is not determinative. 80 U.S.P.Q.2d at 1896. In short, these snippets of text offer no evidence, let alone clear and convincing evidence, as to how the U.S. public understands the term "gruyere."

Opposers' Trial Exhibit 90 includes a few snippets of old newspaper articles that include the phrase "Wisconsin Gruyere." Again, since Opposers have not included the full text of the article, we do not know the full context, but in about half of them, the snippet seems to refer to Roth's "Gruyere," which is no longer called "Gruyere," but instead is called Grand Cru. Similarly, Opposers' Trial Exhibit 82 is a twelve-year-old article about Roth Cheese, published before Roth change the name of the cheese to Grand Cru. The same problem afflicts Opposers' Trial Exhibit 93, which includes outdated ads for Roth's Gruyere, now called Grand Cru. This Exhibit also includes ads for Austrian "Gruyere," but the record is devoid of any evidence showing how much Austrian cheese is labelled GRUYÈRE when sold to U.S. consumers, its market share, or what the effect has been on U.S. consumers.

G. Opposers have failed to submit a consumer survey.

Opposers have not submitted a single declaration from a U.S. consumer or a survey of consumer opinion. As leading commentators have noted, “Many types of evidence may be proffered in trademark disputes on the issue of whether a mark is or has become generic. However, surveys (opinion polls) that measure the ‘primary significance’ of a mark to consumers are ‘almost de rigueur’ in such inquiries.” Deborah Jay, *Genericness Surveys in Trademark Disputes: Evolution of Species*, 99 Trademark Rep. 1118, 1119 n.4 (Sept.-Oct. 2009) (quoting 2 *McCarthy* § 12:14. Accordingly, where the party having the burden of proof fails to conduct a survey, its attempt to prove genericness may fail. *Magic Wand*, 19 U.S.P.Q.2d at 1553 (Where *Magic Wand* had the burden of proof on genericness, TTAB did not err in finding *Magic Wand* failed to meet its burden; “*Magic Wand* supplied no survey evidence of consumer understanding, no letters or testimony from consumers and no affidavits of from consumers showing generic use or understanding of TOUCHLESS.”) “In fact,” Deborah Jay notes, “the failure of a party who is alleging a mark has become generic to conduct a survey may result in a negative inference.” *Genericness Surveys*, 99 Trademark Rep. at 1120.

Here, the Opposers include two large, well-funded trade associations. Opposer International Dairy Foods Association boasts that it is a “trade organization that represents the global trade interests of U.S. dairy producers, proprietary processors and cooperatives, ingredient suppliers and export traders,” with “more than 550 members in these industries.” Notice of Opposition in No. 91232427, ¶¶ 6-7. Opposer U.S. Dairy Export Counsel describes itself in virtually identical language; the only difference is that it has 120 members. Notice of Opposition in No. 91232442, ¶¶ 6-7. These behemoths, along with the other Opposers, have the collective resources to conduct a survey – in addition to having the burden of proof. Their decision not to offer a consumer survey invites an adverse inference that either (1) they attempted to conduct such a survey and

obtained results that did not help their case, or (2) they did not even bother to conduct a survey because they (or their survey expert) believed it would be a waste of time. Although the Board may not wish to require surveys in cases such as this or draw an adverse inference, Opposers' failure to conduct a survey, like their failure to submit any consumer testimony, and their reliance on blatantly false claims, shows that they have not met their burden of proof.

Opposers acknowledge – in a footnote – that they did not conduct a survey, but they offer no excuse or explanation for this failure. (OB p. 29, fn. 17). Instead they cite a thirty-three year old case, which they claim suggests that “survey evidence is not required for a genericness finding.” The case they cite, *In re Cooperativa Produttori Latte E Fontina Valle D’Aosta*, 230 U.S.P.Q. 131, 133 (T.T.A.B. Mar. 19, 1986), says nothing about surveys. Moreover, Opposers ignore the much more recent cases and scholarly articles discussing the importance of survey research.

CONCLUSION

Opposers falsely suggest that Applicants are “misleading the public” (OB p. 15), but it is Opposers who want to mislead the public. If Opposers have their way, Opposers and retailers would be able to label virtually *any* cheese as GRUYÈRE, without regard to its flavor, texture, or ingredients. Apart from Applicants' own efforts, there is currently no organization or agency in the United States that regulates the quality, taste, texture, color, or aroma of cheese made in Wisconsin or Austria that is labelled “Gruyère” and sold in the U.S. There is no requirement that such cheese be made from unpasteurized milk, no requirement that the cows be feed only on grass and hay and not industrial feed, no prohibition on the use of growth hormones or antibiotics, no requirement that the cheese be made daily from milk delivered that day, no requirement that the cheese be aged to develop its flavor, and no prohibition on the use of

additives such as smoke flavor or bacon bits.⁴ As Opposers' own witness, Fermo Jaeckle, admitted, *there is no requirement that cheese made in Wisconsin and labeled Gruyere must taste like GRUYÈRE cheese made in Switzerland.* (Jaeckle Transcript, p. 45-46). Apart from Applicants' own efforts, there is currently nothing to stop a retailer from selling a bland, tasteless, waxy, characterless, industrial product and labelling it "Gruyère." (Bardet Dec. ¶ 31). Retailers will suffer no harm if they sell such a product under a name other than "Gruyère," Allowing retailers to use the name "Gruyère" on cheese made in Wisconsin or Austria would simply invite them to mislead consumers and profit from the enormous goodwill associated with genuine, distinctive, and carefully-made GRUYÈRE cheese crafted according to centuries-old methods by master cheese makers.

Opposers have failed to meet their burden of proof, and should not be allowed to mislead the public. Accordingly, Applicants respectfully urge the Board to dismiss the Oppositions and allow the GRUYÈRE certification mark to be registered. This will protect not only producers of genuine GRUYÈRE cheese in Switzerland and France but also U.S. consumers.

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⁴ Applicants' certification standards (Applicants' Trial Exhibits 1 and 10) do not permit any additives to their cheese. However, cheese made in the U.S., it seems, can have any number of additives, including "wood pulp." See "Parmesan Cheese is Not What it Seems," by Roberto A. Ferdman, Washington Post, February 17, 2016, Applicants' Trial Exhibit 13. The article discusses the alarming presence of "wood pulp" in grated parmesan cheese produced in the U.S.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2019, I caused a true and correct copy of the foregoing **Applicants' Trial Brief** to be served by email to Opposers' counsel of record at:

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